Supreme Court, U.S.
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No. 95-1465

IN THE

Supreme Court of the United States

October Term, 1995

VILLAGE OF DEPEW, NEW YORK,
Petitioner,

vs.

WILLIAM M. GUMMO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does Section 4311(b) of the Uniformed Services Employment and Re-employment Rights Act, 38 U.S.C. §4311(b), apply to cases where the cause of action occurred prior to its enactment?

2. Did the United States Court of Appeals for the Second Circuit err in vacating the judgment of the District Court on the factual issue of motivation of respondent's discharge and remanding the cause for trial?

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OPINION BELOW

The only opinion involved in the Petition for a Writ of Certiorari is the decision of the U.S. Court of Appeals for the Second Circuit issued on January 19, 1996 and published at 75 F.3d 98 (2d Cir. 1995). In an order dated February 13, 1996 the Second Circuit granted a thirty (30) day stay of the mandate.

STATEMENT OF THE CASE

Respondent submits this Brief in Opposition in response to the Petition for a Writ of Certiorari submitted by petitioner. This Brief provides respondent's reasons for denying the Writ, and corrects petitioner's mischaracterization of the actual record developed below, as well as of the scope and effect of the opinion for which Petitioner seeks review.

Respondent adopts the full statement of the procedural history and facts set forth in the District Court opinion, (Pet. App. B, p. A-33), and in the Second Circuit (Pet. App. A, pp. A-2 - A-3).

ARGUMENT

The decision of the Second Circuit is correct, presents no conflict with decisions of this Court or any other Court of Appeals and poses no significant questions of federal law requiring this Court's attention. Accordingly, further review is unwarranted.

I. The Second Circuit's Application of 38 U.S.C. §4311(b) to this case was correct in view of both the statutory language and the legislative history of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

The original Veteran's Reemployment Rights Act, 38 U.S.C. §2021, *et seq.* (VRRA) was first enacted in 1940, and before its recodification in 1974, was found at 50 U.S.C. App. §459. *Monroe v. Standard Oil Co.*, 452 U.S. 549, 554-555 (1981). It was not until 1968, however, when 38 U.S.C. §2021(b)(3) was enacted, that Reservists and National Guardsmen were given protection against discrimination, such as termination from employment, "because of" their military obligation. *See Monroe*, 452 U.S. at 556-56.

This Court, in interpreting the effect of §2021(b)(3), stated that:

> The legislative history thus indicates that §2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status.

Monroe, 452 U.S. at 559.

Five years after this Court decided *Monroe*, in 1986, Congress amended then § 2021(b)(3) by including language that "made it clear that an employer could not refuse to hire an individual because of his or her participation in the Reserves or National Guard." *Boyle v. Burke*, 925 F.2d 497, 502 (1st Cir. 1991). Included in the legislative history of this 1986 amendment is the statement by Congressman G.V. Montgomery, Chairman of the House Veteran's Affairs Committee and sponsor of the amendment that:

> Additionally, it should be noted that the implication in the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), that a violation of section 2021(b)(3) occurs only when the Reserve obligation is the sole motive in the adverse action taken by the employer, is totally inconsistent with the "but for" or "same decision" analysis discussed

> above. Such a concept would allow an employer to escape liability by simply asserting a reason which, by itself, could not justify the adverse action, but would make the action other than solely based on the military obligation. For example, if a company had a policy of discharging employees who were absent without cause five times in 6 months and discharged a reservist who had five absences, two of which were due to his military obligation, the discharge would not be "solely" because of this Reserve obligation, but it also could not stand on its own once the protected absences were omitted.

132 Cong. Rec. H9297 (October 7, 1986).[1]

Notwithstanding this 1986 legislative history, two courts of appeals and one district court expoused the "motivated solely" test of *Monroe* which the Village of Depew contends is the test to be applied to all causes of action which occurred prior to October 13, 1994, the date of enactment of USERRA.

What the Village ignores however is that in all of the cases it cites in support of its claim, the courts *in fact* applied the "but for" test. Thus in *Clayton v. Blachowske Truck Lines, Inc.*, 815 F.2d 1203 (8th Cir. 1987), the Eighth Circuit noted that "the record

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[1] The initial hire protection was a House bill, with no comparable Senate version. *See* 1986 U.S. Code Cong.-Admin. News at 5594. The explanations of an amendment by the bill's sponsor "are an authoritative guide to the statute's construction." *North Haven Board of Education v. Bell*, 456 U.S. 512, 527 (1982).

showed that he had not been terminated solely because of his Reserve status." *Id.* at 1205. The district court had held that: "Three of the four reasons [for the termination] were unrelated to his guard duties and are supported by the evidence." 640 F.Supp. 172, 174 (D. Minn. 1980).

Similarly, in *Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988), the Tenth Circuit found that "there were sufficient other, non-pretextual, reasons irrelevant to his military status [to justify the termination]." *Id.* at 1262. To the same effect is *Britt v. Georgia Power Co.*, 677 F.Supp. 1169 (N.D. Ga. 1987) ("Britt's decision to defy the direct orders of his supervisors was an independent and significant reason for the discharge.") *Id.* at 1174, 1175.[2]

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[2] The issue in *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (6th Cir. 1988) was simply whether the National Guardsman's 15 minute notice of an impending three-week-absence was insufficient under 38 U.S.C. §2024(d). The Sixth Circuit concluded that:

> [It] is apparent to us that no reasonable fact finder could conclude other than that Burkart deliberately knew his notice was too short and would be so viewed by his employer, and that Burkart thereby sought to trigger his own discharge so that he could not only go on military duty but also return, not to his job, but to unemployment compensation.

Id. at 1250. In the case at bar, the Village of Depew did not object to the timelines of respondent's request, but rather conditioned Officer Gummo's release on production of orders that had been previously furnished. *Gummo*, 75 F.3d at 108.

On the other hand, the Seventh Circuit in *Pignato v. American Trans Air, Inc.*, 14 F.3d 342 (7th Cir. 1994) directly applied the "but for" test: "The forbidden motive, [military status] in this case must be a sufficient condition, or but-for cause, of the employee's termination." *Id.* at 349. And, the First Circuit in *Chesna v. International Fueling Co., Inc.*, 102 Lab Cas (CCH) ¶ 11,230 (1st Cir. 1989) did not "feel it necessary to determine whether *Monroe* requires reserve status to be the *sole* reason for dismissal or simply *a* reason." *Id.* at p.23,050; emphasis, the court's.

With this "precedent" in mind, Congress undertook to replace the VRRA in its entirety to "clarify, simplify, and, where necessary, strengthen the existing veteran's employment and re-employment rights provision. H.R. Rep. No. 103-65, 103d Cong., 2d Sess. at 18 (House Report) *reprinted in* 1994 U.S. Code Cong. and Admin. News at 2449.

As noted by the Second Circuit in this case, Congress replaced the "because of" language of section 2021(b)(3) with language that states that an employer violates the Act if an employee's "obligation for service in the uniformed service is a motivating factor in the employer's action, unless the employer can prove that he action would have been taken in the

absence of such . . . obligation." 38 U.S.C. §4311(b). This is clearly an expression of the "but-for" test.

That Congress intended that the "but-for" test be applicable to all discrimination cases brought under either VRRA or USERRA, regardless of the date of accrual of the cause of action is unequivocal and no court to date has held differently.[3]

The Second Circuit in this case studiously recited the legislative history of § 4311(b) of USERRA, including the house report (75 F.3d at 105-106), the Senate Report (*Id.* at 106 and the Joint Explanatory Statement (*Id.*), before concluding that:

> Given Congress's clear statements as to its original intent in enacting the VRR and its wish to have the courts apply §4311(b) in accordance with that intent to all cases regardless of their vintage, we conclude that the district court should not have employed the sole-motivation analysis adopted by *Monroe* and its progeny.

Id.

The Village of Depew does not challenge the clear import of the legislative history, as it cannot, but rather argues that "Congress must provide a 'clear

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[3] Two district courts have applied the "but for" test of USERRA to pre-USSERA causes of action. *See Hanson v. Town of Irondequoit*, 896 F. Supp. 110, 114 n.3 (W.D.N.Y. 1995); *Novak v. MacKintosh*, 1996 U.S. Dist. __ LEXIS 3892 (D.S.D. 1996).

statement' in the text of the statute sufficient to defeat the presumption against retroactively." Pet. at 14. This is an incorrect interpretation of this Court's decisions in *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S.Ct. 1510 (1994) and *Landgraf v. USI Film Products, et al*, ___ U.S. ___, 114 S.Ct. 1483 (1994), upon which the Village relies.

Indeed, in both *Rivers* and *Landgraf*, the Court took pains to emphasize that a review of the legislative history of the statute at issue failed to find "evidence of an agreement among legislators on the subject." *Rivers*, 114 S.Ct. at 1517n.8. *See also, Landgraf*, 114 S.Ct. at 1495: "The relevant legislative history of the 1991 Act reinforces our conclusion that §§ 402(a), 109(c) and 402(b) cannot bear the weight petition places upon them . . . The legislative history discloses some frankly partisan statements . . . but these statements cannot plausibly be read as reflecting any general agreement."

Quite the opposite is true in this case. USERRA passed by unanimous vote in both Houses of Congress, both before and after the conference which reconciled each chamber's bills. And, as is set out in detail in the Second Circuit's decision, both the House and Senate Reports make clear that the "but-for" test was to apply to all cases "'*regardless of the date of*

accrual of the cause of action.'" *Gummo*, 75 F.3d at 106; emphasis the court's.

As a final note, the Village states that "*Monroe* has been cited in almost 200 opinions, and no court considering *Monroe* has ever questioned its holding that the adverse employment action . . . must be solely motivated by reservist status to warrant redress under the Act." Pet. at 12 n.3. Not only is this statement incorrect (*see Pignato; Chesna* cited *supra* herein at 6; *see also Cook v. 84 Lumber*, 99 Lab. Cas. (CCH) ¶10,639 at p. 20,077 (N.D. Ohio 1983)), but it is grossly misleading. Of the opinions citing *Monroe*, some are not veteran's re-employment rights cases (*see e.g. Lehman v. Nakshian*, 453 U.S. 56, 163 (1981)) and most of the others deal with non-discriminatory issues (*see e.g. Perz v. School City of Hammond*, 29 F.3d 899, 899, 900 (7th Cir. 1994); *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 243 (8th Cir. 1991); *Colon v. County of Shawnee*, 875 F.2d 594, 596 (10th Cir. 1987)).

In fact, since *Monroe*, there have been 55 reported decisions which have mentioned section 2021(b)(3).[4] Nine of these decisions are the appellate decisions of reported district court decisions. Of the 46 remaining decisions, only 28 implicated, while not necessarily

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[4] Ascertained through a LEXIS search.

discussing, the standard of proof at issue here, an average of two decisions per year.[5]

In view of the fact that so few cases will be impacted by the application of the "but-for" test to pre-USERRA causes of action, there is no compelling or significant issues of federal law to be decided.

II. This Court should not decide whether the Second Circuit's order vacating and remanding the judgment to ascertain the factual issue of motivation was in error.

The Village of Depew has also requested that this Court review the factual record in this case to determine whether the remand by the Second Circuit was appropriate. In essence, the Village is arguing its case on the merits, a matter that is to be left to the district court.

Having found that Officer Gummo had established a *prima facia* case of reserve discrimination, having found that "a jury could reasonably infer that the denial of Gummo's leave request . . . was pretextual," (75 F.3d at 108) and having found that the district court applied the wrong

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[5] It is thus abundantly clear why there have been only three decisions in the almost 1 1/2 years since the enactment of USERRA that have dealt with the "but-for" issue.

legal standard of proof, the vacating of the judgment and remanding the case back to the district court was totally appropriate.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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